

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-213872.3**DATE:** March 11, 1985**MATTER OF:** Mayden & Mayden**DIGEST:**

Protest is sustained where the agency permitted the awardee to reduce its price after best and final offers without extending the same opportunity to the protester whose proposal was within the competitive range.

Mayden & Mayden (M&M) protests the award of a contract for the lease of an office building by the Forest Service, Department of Agriculture to the Roth-Radcliffe Company (R-R) under request for proposals (RFP) No. R4-83-11. M&M contends that the award was improper because after best and final offers, the agency conducted negotiations only with R-R and permitted R-R to reduce its price. M&M also contends that the proposal costs were improperly evaluated and that after award R-R was permitted to substitute another building site for the site initially proposed and evaluated.

We sustain the protest.

The RFP was first issued on July 1, 1983. After M&M's offer was selected for award, R-R protested to our Office. The agency then determined that the RFP evaluation criteria were defective and canceled the RFP. R-R also protested the cancellation, and we denied its protest. See Roth-Radcliffe Co., Inc., B-213872.2, June 1, 1984, 84-1 C.P.D. ¶ 589.

The RFP required a minimum of 12,085 square feet of usable office and related space. Offers were to be submitted on an annual net usable square foot rate basis. The RFP also required that the offers include 100 parking places, 27 of which were for government vehicles (which had to be enclosed within a chain link fence).

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The RFP contained the following evaluation criteria, listed in descending order of importance: (1) price; (2) energy efficiency; (3) design; (4) environment; (5) safety; (6) estimated occupancy date and (7) estimated relocation or disruption cost (to be used only as a tiebreaker between otherwise equal offers). The award provision stated that award would be made to the offeror whose proposal was technically acceptable and whose technical cost relationship was most advantageous to the government.

M&M proposed to construct a second story to its existing building, which is already occupied by the agency. It offered a total of 12,085 square feet of space, at \$8.75 per square foot. R-R proposed to construct a new building of 12,429 square feet at \$8.77 per square foot, plus \$10 each for 27 government parking spaces.

Both offerors were given an opportunity to revise their proposals and both responded by letters dated August 24, 1984. R-R revised its building plan and reduced the offered space to 12,172 square feet. It also clarified that the 27 parking spaces would cost \$10 per month each in addition to the office rent, but stated that this charge was negotiable.

The agency's initial technical evaluation rated M&M's proposed building superior in energy efficiency and R-R's building superior in design and environment. An agency architect, however, then prepared an energy analysis showing that it would cost \$10,589 per year to heat the M&M building and \$8,724 per year to heat the R-R building. The agency calculated that its total yearly cost for the M&M building would be \$116,332.75 (12,085 feet x \$8.75 each = \$105,743.75 + \$10,589 heating = \$116,332.75). The agency determined that its yearly costs for the R-R building would be \$115,472.44 (12,172 feet x \$8.77 each = \$106,748.44 + \$8,724 heating = \$115,472.44).

As can be seen, the \$106,748.44 figure on which the agency based its calculation of R-R's price did not include the charge for parking places, which totaled \$3,240 per year. It is apparent that if the \$3,240 parking charge

had been included in the evaluation, R-R's evaluated price would have been \$2,379.69 higher than M&M's evaluated price. The parking charge was included in R-R's cost proposal until September 13, when R-R sent a mailgram to the agency stating that in accordance with its conversation of the same date with the agency, the charge for the parking places was eliminated.

The agency determined that R-R's proposal provided the technical/cost relationship which was most advantageous to the government. By letter of September 17, the agency accepted R-R's proposal and gave R-R a notice to proceed.

One of the basic principles of federal procurement law is that when an agency reopens discussions with one offeror after receipt of best and final offers, that agency must reopen discussions with all offerors whose proposals are within the competitive range. See Community Economic Development Corp., B-211170, Aug. 23, 1983, 83-2 C.P.D. ¶ 235; Bowman Square Properties, B-208699, Dec. 13, 1982, 82-2 C.P.D. ¶ 527. All such offerors must also be given a chance to submit revised proposals. Harris Corp., B-204827, Mar. 23, 1982, 82-1 C.P.D. ¶ 274. Discussions occur when an offeror is given an opportunity to revise its proposal and this is so regardless of whether the opportunity arose from actions initiated by the offeror or the government. 51 Comp. Gen. 479, 481 (1972).

The \$3,240 parking charge for the 27 parking spaces was clearly part of R-R's initial price, separate from the office rent. R-R, upon inquiry by the agency, confirmed that the charge was in addition to the charge for the office space. Thus, it is clear that as a result of the phone conversation between the agency and R-R on September 13, R-R was given an opportunity to revise its proposal after receipt of best and final offers.^{1/} Under these circumstances, the agency should have extended the

^{1/} while the solicitation permitted the acceptance of a late modification to an otherwise successful offer which made its terms more favorable to the government, this provision concerns the situation where a late modification is submitted without further negotiations. See Harris Corp., supra. Further, it is not clear from the record that R-R was considered the otherwise successful offeror prior to the price reduction. Id.

B-213872.3

same opportunity for proposal revision to M&M and any other offerors whose proposals were in the competitive range.

Further, it appears that M&M might have been prejudiced by the agency's actions since price was the most important evaluation factor, and M&M's price was low before the parking charge was eliminated from R-R's proposal. Although R-R did score better than M&M in the evaluation areas of design and environment, it is not clear from the record that these factors were sufficient to overcome the price difference between the two proposals. Accordingly, the protest is sustained.

In view of this conclusion, reopening of negotiations and the submission of best and final offers normally would be recommended. In this connection, further negotiations would be based on R-R's new site and should include air conditioning efficiency of the building as well as heat efficiency previously considered. However, the contract with R-R has no provision permitting termination for the convenience of the government. Thus, we can make no recommendation for contract termination without placing the government at risk of a substantial claim for damages. See Louisiana Pacific Corp., B-210904, Oct. 4, 1983, 83-2 CPD ¶ 415. Moreover, we find no indication in the record that R-R was on direct notice that the procedures followed by the agency were improper or that R-R's actions contributed to the improper award to an extent that would permit a cancellation without liability to the government. See 52 Comp. Gen. 215 (1972).

Accordingly, we are not recommending contract termination or cancellation in this case. Nevertheless, by separate letter of today we are recommending to the Secretary of Agriculture that action be taken to prevent a recurrence of the procurement deficiency discussed above.

for Harry R. Van Cleave
Comptroller General
of the United States